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In the Supreme Court of the United States

OCTOBER TERM 1960

MAKAH INDIAN TRIBE, a corporation, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. App. 3A-18A) is reported at 7 Ind. Cl. Com. 477. The order of the Court of Claims (Pet. App. 1A-2A) is not reported.

JURISDICTION

The order of the Court of Claims was entered December 1, 1960 (Pet. App. 1A). The petition for a writ of certiorari was filed on February 27, 1961. The jurisdiction of this Court is invoked under 28

U.S.C. 1255(1). See also Section 20(c) of the Indian Claims Commission Act of August 13, 1946 (25 U.S.C. 70s).

QUESTION PRESENTED

Whether the enforcement of regulations pursuant to international agreement controlling fishing for seal and halibut in waters of the North Pacific Ocean constituted a partial taking of the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations" which was "secured to said Indians in common with all citizens of the United States" by a 1855 treaty.

TREATY PROVISION INVOLVED

Article IV of the Treaty with the Makah Tribe, concluded January 31, 1855, 12 Stat. 939, provides:

> Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

STATEMENT

The Court of Claims has affirmed without opinion, Judge Madden dissenting, a judgment of the Indian Claims Commission dismissing, after trial, a claim

for $10,000,000 for alleged deprivation of fishing rights reserved under Article IV of the 1855 Treaty. The findings of the Commission, as well as the Commission's opinion (Pet. App. 3A-18A), state the facts in detail. In brief, they are as follows:

The Makah Tribe in Washington state is one of a group of fish-eating Indians inhabiting the northwestern United States and adjoining Canada (Fdgs. 1-6, Pet. App. 4A-6A). The Treaty of 1855 was one of several negotiated with Indian tribes of the area at about the same time, all of which contained similar provisions protecting fishing rights. The Indians hunted seals by "pelagic fishing," *i.e.*, by spearing or harpooning them at sea (Fdg. 7). Unrestricted hunting by fire arms threatened extinction of the seals and resulted in an arbitration with Great Britain and ultimately, in 1911, in an International Convention which was implemented by legislation (Fdgs. 9-10). All of the agreements and statutes exempt Indian fishing in their customary manner in open canoes without firearms (Fdgs. 9-10). The Indians, for reasons other than the governmental regulations, have abandoned their traditional method of sealing (Fdg. 12).

As to halibut fishing, progress of civilization depleted the yield so that International Agreement was necessary primarily to limit the fishing season (Fdgs. 13-21). The regulations thereunder apply to the Indians. The Commission found that the halibut restrictions "are fair, reasonable, and absolutely necessary to conserve, protect, and rehabilitate the halibut species" (Fdg. 21). It further found (Fdg. 21):

(3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, and in no sense was this treaty provision a guarantee of future commercial fishing rights.

(4) Petitioner has failed to prove that in complying with the regulations of the halibut Commission, or by their enforcement, the individual members of petitioner tribe suffered a deprivation to the extent that they are unable to sustain their immediate wants or that of their families consistent with a subsistence economy.

The opinion of the Commission (Pet. App. 16A) summarizes the findings as to the present situation as to halibut fishing as follows:

> While the regulations on certain occasions might prove somewhat irksome and inconvenient to the Indians by regulating the time and manner in which they may fish for halibut, it has been the growth and sharp competition of commercial fishing more than anything else that has interfered with the Makah's *ability* rather than their *right* to fish. Customary "hand line" fishing methods as practiced by the Makahs with their present equipment cannot compete volume wise with the "long line" commercial fishing boats, and acquiring and outfitting a modern fishing vessel is prohibitively expensive to the petitioner tribe. [Emphasis by the Commission.]

Discussing the cases in this Court, the Commission concluded that fishing rights under the 1855 Treaty were subject to regulation for conservation purposes

(Pet. App. 8A-11A). It concluded that the governmental actions concerning seals were necessary conservation measures and do not abrogate the right reserved in the 1855 Treaty (Pet. App. 14A). A similar conclusion was reached as to halibut fishing, as follows (Pet. App. 17A-18A):

> The Commission, therefore, is of the opinion that the Makah fishing rights reserved under the 1855 treaty are in no sense commercial rights, and on the contrary mean simply that the Makah Indians, as in the case of other west coast fish eating Indians, were to continue to have the right of taking fish and other marine products from the usual and accustomed places in order to satisfy immediate wants and provide the necessary sustenance for themselves and their families consistent with their then subsistence economy.

ARGUMENT

The petitioner's claim is to a right of commercial sealing and fishing free of the restrictions applicable to all other commercial fishermen imposed for conservation purposes. It is erroneous both in fact and in law.

1. As a matter of treaty construction, the Commission's factual conclusion, concurred in by the Court of Claims, that the parties could not have referred in 1855 to the commercial taking of seals and halibut, but rather referred to the practice then followed by the natives of sealing and fishing for their own subsistence and personal use, is clearly correct (Pet. App. 17A-18A). The very wording of Article

IV of the Treaty as a whole, *supra*, p. 2, referring to rights "in common with all citizens of the United States," and the erection of "temporary houses for the purpose of curing," and to the "privilege of hunting and gathering roots and berries," confirms this view. Certainly, it is not to be assumed that by this treaty Congress undertook to tie its hands or to subject the United States to a large liability when, in the future, it should establish conservation controls to preserve the resources from total destruction.

2. The law, as declared by this Court, sustaining the application of conservation laws to Indian fishing is equally clear. *Tulee* v. *Washington*, 315 U.S. 681, the latest pronouncement on the subject, states (p. 684):

> From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U.S. 375, 384; *Seufert Bros. Co.* v. *United States*, *supra*, 198-199 [249 U.S. 194].

This Court there also said (p. 684):

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that,

> while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.

In *Kennedy* v. *Becker*, 241 U.S. 556, the Court held that Indian hunting and fishing privileges were subject to New York State conservation measures, saying (pp. 563-564):

> We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.

There is no suggestion in these decisions that the Indians are exempt from general state conservation law and that some special rule applies as to Indians. Unrestricted commercial fishing has the same effect on the fish supply whether the commercial equipment be operated by white men, Indians or persons of any other race.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

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